IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2886 OF 1992

Kishore Morumal Bachani ...Applicant
Vs.
The State of Maharashtra ...Respondent

Shri A.S. Khandeparkar with Shri Santosh D. Raje for the Applicant.
Mrs S.D. Shinde, A.P.P. for the Respondent.

CORAM : S.C. DHARMADHIKARI, J.
DATE : DECEMBER 21, 2005
DECEMBER 22, 2005.

ORAL JUDGMENT:

1. Special Case No.27 of 1986 in which the present Applicant is arrayed as accused No.4 is pending before the Court of Special Judge, Mumbai. The Applicant applied for discharge and his Application is rejected by the learned Special Judge by order dated 17th June, 1992. This Criminal application, therefore, invokes section 397 read with section 482 of the Code of Criminal Procedure, 1973 to challenge the said order.

2. It is not necessary to consider the case of other accused in this Application because order of the learned Special Judge has been challenged only to the extent it dismisses the Application for discharge preferred by the Applicant herein.

3. It is not necessary to make a detailed survey of the prosecution case save and except stating that the accused has been charged for offences punishable under section 120-B, 465, 466, 467, 468, 471, 477-A, 420 of the Indian Penal Code read with sections 5(1)(d), 5(2) of the Prevention of Corruption Act, 1947 . Special Case No.27 of 1986 arises out of the investigation into A.C.B.C.R.No.1 of 1985. A.C.B.C.R.No.1 of 85 of A.C.B. FSI Cell Bombay was registered on the basis of enquiries made into F.S.I. Malpractices in respect of Plot No.E/332 of Bandra. The other accused are officers working with the City Survey Office as well as the Department concerning land records. Accused No.3 who is the brother of the present Applicant had at the relevant time formed a partnership, inter alia, for carrying on business as builder and developer. Accused No.5 is an Architect by profession.

4. The prosecution case unfolding from the statement of eighteen witnesses and documents running into 245 pages is that the above mentioned plot originally belonged to Abdul Mohmmad Behnahany. He purchased the said plot from the Manager, B.S.D. in April 1931. The agreement to this effect is executed on 21st September, 1931. The area of the property was

recorded as 1012 sq.yds (846.13 sq.mts). The plot was declared as non-agricultural on 11th September, 1937 with the same area. It is not necessary to refer to the facts pertaining to this property changing hands from time to time. However, it would be necessary to refer to an Agreement for Sale dated 21st May, 1980, Power of Attorney of the same date and Deed of Indemnity between Mahendra Bhansali and others and M/s. Aman Enterprises and Rasik Kapadia. At that time also the plot area was, according to the prosecution, 1012 sq. yds equivalent to 846.13 sq.mts. Subsequently, the accused No.3 and the present Applicant were introduced as partners of M/s Aman Enterprises. Original partners including Mahendra retired from the company. Only the Applicant No.4 and his brother were the partners at the relevant time. This is reflected from the Deed of Partnership and Retirement. The prosecution alleges that even in these documents the area is 1012 sq.yards equivalent to 846.4 sq.mts., however, xerox copy of the Power of Attorney executed by Rasiklal in favour of accused No.3 Shivkumar showed area as 1013 sq.mts. or 1212 sq.yards.

5. Therefore, whether the area is 1212 sq. yards or 1012 sq. yards is the major issue arising out of

the prosecution case. In paras 18 to 20 of the order under challenge, the learned Special Judge has taken note of the further allegations leading to the interpolation and alteration of the area of the plot in question. He refers to the role played by each of the accused and sums up the material allegations in paras 21 and 22 of the impugned order.

6. In the Application for discharge preferred by the present Applicant, he contended that assuming without admitting the allegations levelled by the prosecution as far as he is concerned are correct, yet, he is not guilty of any of the offences alleged. Neither has he conspired in alteration and interpolation of the records nor he has made any dishonest representation or cheated the concerned parties on the basis of the same.

7. The Application for discharge further narrated that Applicant was a partner in M/s.Aman Enterprises for a brief period. The said M/s.Aman Enterprises purchased the property from original plot holder. He has signed the final conveyance in 1981 as purchaser-Chief Promoter of the Society. However, he did not take any part in preparing the proposal and that his brother Shivkumar Morumal Bachani (accused

No.3) was constituted attorney of Shri R.C. Kapadia. He has presented the proposal as Builder. Merely because Applicant was part of the Builder Firm and had signed the final conveyance, does not mean that he was aware of the events and the alleged discrepancy in the plot area.

8. The aforesaid pleas of the Applicant (accused No.4) were controverted by the prosecution and in the reply filed to the application for discharge as well as written submissions in support thereof, it was contended that the submissions of the Applicant overlook the fact that he was one of the partners alongwith accused No.3 when M/s.Aman Enterprises took over development of the subject plot. It may be that the development was by M/s.Aman Enterprises through the brother of the Applicant herein namely, Shivkumar. But when the Applicant became the partner he knew the area of the subject plot. He also knew the area when he signed the Sale Deed as promoter of the proposed co-operative society. It is in these circumstances difficult to accept the plea that the Applicant is an innocent man.

9. The Court below has noted the rival contentions as also it has referred to the settled

principles which have to be applied while considering the Application for discharge under section 239 of the Code of Criminal Procedure. It was pointed out to the court below that if the charge levelled is groundless, then the Magistrate has to discharge the accused and record his reasons for doing so is the mandate under section 239. In cases falling under section 245 after evidence is referred to and no case being made out, which, if unrebutted would warrant conviction, the Magistrate shall discharge the accused. It is clear that the said principle has to be applied while considering the Applications made in this case as well. However, the learned Special Judge was of the view that it cannot be said that merely because the accused No.3 is the brother of the present Applicant that Applicant is made an accused in this case. The accused No.4 has not been unnecessarily brought in. This finding is recorded despite documents placed on record to show that they were signed by the accused No.3 and not accused No.4. In para 58 of the order passed by the learned Special Judge he has observed that each fact pertaining to accused No.4 will certainly have a bearing but at this stage it is not possible to reach a conclusion that the Applicant (accused No.4) has no connection with the charges levelled. Consistent with this conclusion, the

learned Special Judge held that the request of the Applicant to discharge him cannot be aceded to. It is this order which is under challenge in this Application.

10. Shri Khandeparkar, learned Counsel appearing for the Applicant submits that the learned Judge has erred in not discharging the accused No.4. In the present case, the learned Judge should have accepted all pleas and discharged the Applicant-accused No.4. Shri Khandeparkar contends that the Applicant is born on 29th November, 1964. The period of the conspiracy is 18th May, 1979 to 09th May, 1982. The Applicant was admittedly a minor during the relevant time. The charges are that for obtaining excess FSI the area has been altered in the land records by interpolating the figures therein. As far as this aspect is concerned, within short period of two months, when the Applicant was associated with M/s.Aman Enterprises unless and until it is demonstrated that all such acts and deeds took place between this period and further Applicant was primafacie aware of the same then it cannot be said that there is sufficient ground to proceed. The conclusion is vitiated by an apparent error and needs to be corrected by this Court. According to Shri Khandeparkar, it is not disputed that while the

Applicant was admitted into the partnership he was a minor and while he retired therefrom he continued to be so. He points out that in the discharge application specific averments have been made and in that behalf he invites my attention to an averment made in para 8 of the said application/written submission where it was pointed out that if the Deed of Retirement dated 10th January, 1981 is perused it is absolutely clear that the Applicant ceases to have any connection with the Firm, after this period. All liabilities and assets were taken over by the accused No.3 and another. The proposals were submitted to the B.M.C. on 21st May, 1981 by the accused No.3 and plans were approved in favour of the accused No.3. All flats were sold after retirement of the Applicant. Thus, after Deed of Retirement dated 10th may, 1981, the events leading to alleged interpolation and correction of the figures pertaining to the land in question have been taken place. If that be the position, then irrespective of the association of the Applicant as a partner and the events leading to the acquisition of the rights in the property by the Firm, he cannot be charged with offences punishable as above. In these circumstances, the Applicant should have been discharged.

11. Shri Khandeparkar then invites my attention to the discharge application and to the reply thereto by the prosecution. More particularly, he invites my attention to paras 3 and 5. The increase in area of the plot by 167.1 sq.mtrs resulting in excess FSI to this extent has not been attributed to the Applicant. Shri Khandeparkar has then taken me through pages 24, 25 as also 26 to 28 of the paper-book which contain the submissions as urged before me. In other words, Shri Khandeparkar submits that it is not as if for the first time these contentions have been urged. In this view of the matter, according to Shri Khandeparkar Application for discharge should have been allowed and the Applicant discharged from the Special Case.

12. On the other hand Mrs Shinde, A.P.P. appearing for the Respondent submits that the view taken by the learned Special Judge does not call for any interference under section 482 of the Code of Criminal Procedure. She submits that at the stage where the matter is all that is required to be considered is whether the charge is groundless. In the present case, it cannot be said that the charge is groundless. Admittedly, the Applicant is associated with M/s.Aman Enterprises. The period of association is wholly irrelevant. Equally, the subsequent

retirement is also of no consequence. When the Applicant is part of the same family and partner of the said Firm and the learned Judge having noted the role played this will not be a proper stage to discharge accused No.4. It is further contended that the Applicant actively participated from the beginning till the building proposal was submitted to the Bombay Municipal Corporation. She submits that the ingredients of criminal conspiracy as provided in law are satisfied in this case in as much as the Applicant is aware of the area of the plot. Therefore, it is difficult to accept that he is totally innocent. His age is also a factor which is wholly irrelevant in as much as whether he is admitted for the benefits of the partnership not germane or relevant for the purposes of criminal prosecution. She, therefore, submits that when the Applicant admits that he is the Chief Promoter of the proposed co-operative society and that building is located on the same plot, then he is deemed to have been aware of the records and documents pertaining to this plot. She, therefore, submits that the Application should be dismissed. She brings to my notice the fact that plans were prepared and submitted on the basis of forged property card extracts, to the Bombay Municipal Corporation. She invites my attention to the discussion on this aspect in the

order under challenge. She submits that the Applicant who is also an accused in another case had signed some documents. He is the brother of the builder and incharge of family business and therefore, the view taken by the learned Special Judge does not call for any interference.

13. With the assistance of Shri Khandeparkar and Mrs. Shinde, I have perused the Application for discharge, the reply of the prosecution thereto and the observations of the learned Special Judge thereon. As far as the Applicant is concerned, the approach of the learned Judge considering the admitted facts is that everything that is brought to his notice in support of the application for discharge is relevant and has some bearing in so far as outcome of the proceedings. He is also aware of the fact that the present Applicant is impleaded because he is brother of accused No.3. In para 53 of the order under challenge, the learned Judge refers to the role played by the accused No.3. It is, on the own showing of parties, an active role. The learned Judge is also aware of the settled principles in law which have to be applied while considering an Application for discharge. Yet, in para 57 of the impugned order, he concludes that it is not possible to absolve accused

No.4. The observations of the learned Judge need to be reproduced:

> "The factual aspects pointed out showing involvement of Accused No.3 need to be given due weight while considering the success or otherwise of prosecution in proving its case finally. At this stage the allegations in the complaint cannot be thrown out showing them as wrong. It is well known-that concept of "dishonest intention" is a matter of inference to be drawn at the final hearing all facts will have to be taken into account. At this stage it can not be said that Accused No.4 is unnecessarily brought in. True that in the search documents were recovered from the residence of architect were signed by Accused No.3 and not the Accused No.4. But that fact itself will not absolve accused No.4. Coming to legal aspect about the principles laid down in the authorities and maxim there can be no doubt but on factual aspects it can be said that case for discharge is not made out."

14. In para 58 of the impugned order, the learned Judge notes the fact that there is nothing to show

that the accused No.4 was Chief Promoter. In other words, assuming, this is so, he has not played a major role. However, despite holding that the submission is worth considering the learned Judge proceeds to hold that relevant provisions of the Conveyance Deed will have to be scanned in the light of the surrounding circumstances. If every single factor brought to the notice of the learned Judge pertaining to this accused is worth considering and has a bearing on the case, then one fails to understand as to how the learned Judge proceeds that as far as the Applicant is concerned, the charge is not groundless.

15. In my view, there is much substance in the submissions of Shri Khandeparkar that considering the period of conspiracy and the duration of the Applicant's association with the Firm, this is not a case where he would be aware of the conspiracy. It is true that as far as conspiracy to commit an offence is concerned, accused need not be aware of all details. However, the basic ingredients that two or more persons agree to do or cause to be done an illegal act or an act which is legal by illegal means then an agreement of such nature is designated as criminal conspiracy. In the present case, for a brief period, a minor like the Applicant herein was admitted to the

partnership Firm M/s. Aman Enterprises. That on some Application and document for issuance of extract from the Property Register his signature is obtained does not carry the matter any further. It cannot be said that he was part of the conspiracy or agreed to commit illegalities or used illegal means in the instant case. On the other hand, it appears to me that being a brother of the builder and to assist him for a brief period, he was part of the Firm. That subsequently, he became Chief Promoter of the Society does not mean that he was aware of the plans of construction, the interpolations and corrections in the entries pertaining to the land records, contents of the Applications seeking copies and other documents etc. When his brother Shivkumar Bachani and the original owner (R.C.Kapadia) are in actual know of things and it is on that basis that their Applications for discharge have been rejected, then, it is difficult to sustain the primafacie view in so far as the present Applicant is concerned.

16. I am fully aware that this is primafacie view of the matter. The matter has to proceed on the basis that even if the allegations of the prosecution are taken as true, as far as the present Applicant is concerned, he cannot be held guilty of the offences

alleged against him. That such course is permissible even at this stage is not disputed by the learned Special Judge. That each of the aspects brought to his notice by the Applicant-accused No.4 has bearing on the matter including on framing a charge is also not disputed. This being the position, the learned Judge could not have proceeded to reject the Application of this Applicant. The averments in the Application for discharge and those particularly in the written submissions have not been dealt with and infact, the learned Judge proceeds to accept them. In this view of the matter, the conclusion of the learned Judge that all such aspects and facts may be true but must be considered at the stage of trial, is unsustainable in law. The observations of the learned Judge reproduced and referred by me herein above are enough to uphold the contentions of Shri Khandeparkar. In the light of the above conclusion, in my view, the Application for discharge made by the Applicant herein deserves to be granted.

17. The order of the learned Special Judge to the extent it refuses to discharge the Applicant herein is quashed and set aside.

18. The Applicant No.4 shall stand discharged from

the Special Case No.27 of 1986. However, all observations made by me as well as the Special Judge with regard to the case of the present Applicant shall not have any bearing on the merits of the case and also the allegations of the prosecution pertaining to other accused. Rule made absolute in terms of prayers (b) and (c).

JUDGE